Public Finance Bhd v Soo Hock Siong

HIGH COURT (IPOH) – CIVIL SUIT NO 24-159-87
ANUAR J
16 DECEMBER 1987

Banking – Loan secured by charge – Claim instituted to recover debt – Whether claim is a charge action or action in contract – Whether leave under O 83 r 4(1) of the Rules of the High Court 1980 is required before default judgment can be entered – Rules of the High Court 1980, O 83 r 4(1)

Civil Procedure – Default judgment – Setting aside – Loan secured by charge – Claim instituted to recover debt – Whether claim is a charge action or action in contract – Whether leave under O 83 r 4(1) of the Rules of the High Court 1980 is required before default judgment can be entered – Rules of the High Court 1980, O 83 r 4(1)

The plaintiff obtained a judgment in default against the defendant in respect of an outstanding loan granted by the plaintiff to the defendant. The loan was secured by a charge. The defendant filed the present application by way of summons-in-chambers to set aside the judgment. The defendant contended that the judgment entered is irregular in that no leave has been obtained under O 83 r 4(1) of the Rules of the High Court 1980.

Held, dismissing the application: The letter of offer in which the plaintiff agreed to grant the defendant a loan forms the basis of the contract between the plaintiff and the defendant. The plaintiff's action is therefore a simple claim to recover a debt. The claim is not a charge action and therefore O 83 r 4(1) of the Rules of the High Court 1980 does not apply.

Legislation referred to
Rules of the High Court 1980 O 83 r 4(1)

Yogamalar Cumarasamy (Miss) for the plaintiff.
Chan Kok Keong for the defendant.

Cur Adv Vult

Anuar J: This is an application by the defendant by way of summons-in-chambers to set aside a judgment in default dated 25 June 1987 entered against the defendant.

The main ground upon which this application is made is that the judgment entered is irregular in that no leave has been obtained under O 83 r 4(1) of the Rules of the High Court 1980.

The plaintiff's claim against the defendant is for a sum of $99,001.98 being the balance still outstanding in respect of a loan granted to the defendant by the plaintiff.

The plaintiff filed the suit on 2 March 1987 and the writ was served on the defendant on 19 March 1987. The defendant entered appearance on 2 April 1987. The defendant failed to file a defence. The plaintiff then obtained judgment in default of defence on 25 June 1987.

Under O 83 r 4(1) of the Rules of the High Court 1980, judgment in default of defence shall not be entered except with the leave of the court. This rule affects a charge action begun by writ.

The defendant claimed that the plaintiff had obtained the judgment without the leave of the court. However, the plaintiff contended that it is not a charge action and therefore no leave is required under O 83 r 4(1).

The issue therefore is whether the plaintiff's claim is a charge action or not. If it is a charge action, then O 83 r 4(1) of the Rules of the High Court 1980 would apply and leave must be obtained before judgment in default of defence could be entered.

It is not denied that the loan is secured by a charge. However, the plaintiff contended that the claim is not a charge action. It is an action in contract and one to recover a debt. It is therefore not bound by O 83 r 4(1) of the Rules of the High Court 1980.

The plaintiff relies on the letter of offer dated 10 May 1982 in which the plaintiff agreed to grant the defendant a loan of $70,000. This letter of offer forms the basis of the contract between the plaintiff and the defendant. The plaintiff's action is therefore a simple claim to recover a debt. With respect I agree with the plaintiff. In my judgment the claim is not a charge action. It is a claim based on contract and therefore O 83 r 4(1) of the Rules of the High Court does not apply.

For the reasons above, I would dismiss this application with costs.

Order accordingly.

Solicitors: *Toh Theam Hock & Co*; *Chan & Associates.*

Reported by *Ng Sheau Jiuan*

United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)

HIGH COURT (PENANG) – ORIGINATING SUMMONS NO 31-835-1986
EDGAR JOSEPH JR J
8 AUGUST 1988

Land Law – Foreclosure proceedings – Application to set aside order for sale – Express restriction in interest prohibiting charging without written sanction of the authority – Charge registered in breach of – Whether charge void – Whether application time-barred by three-month limit – Specific performance – Further consequential orders – National Land Code 1965, ss 340(2)(b), (2)(c) & 418 – Rules of the High Court 1980, O 31 r 2 – Contracts Act 1950, s 66

This is an application by the chargor to set aside an order for sale of certain land comprised in QT No HS(D) 19, Lot No 40(2), section 14, Bandar Georgetown, Penang, NED Penang ('the land') pursuant to the provisions of s 256 of the National Land Code ('the Code').

The ground upon which the chargor relies in support of their claim for a declaration is that the charge is void in that it was created on 11 February 1983 and registered on 16 December 1983, in breach of an express restriction in interest endorsed on the issue document of title to the land under s 120 of the Code, prohibiting, inter alia, the charging thereof without the written sanction of the state authority. The same was not approved until 11 April 1988. It was submitted on behalf of the chargor that, inter alia, the chargee's title or interest in the land was thus defeasible because the registration thereof was obtained by means of an insufficient or void instrument. The chargee's counsel contended that since the chargor did not avail themselves of the remedy of appeal within the time prescribed in s 418 of the Code, it was not now open to them to impugn the order for sale by the present proceedings.

Held, allowing the application:

(1) The submission of the chargee's counsel relying on s 418 of the Code fails. Where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings before any court or tribunal, and in collateral proceedings the court may declare an act that purports to bind to be non-existent. The party affected by the decision may appeal but he is not bound to do so because he is at liberty to treat the act as void.

(2) In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted ultra vires the powers conferred upon him by s 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute. In the result, the chargor is entitled to the declaration prayed for, namely, that the order for sale aforesaid, in so far as it relates to the land, be set aside. In consequennce, the order of the senior assistant registrar dated 17 December 1987 made pursuant to the summons to proceed with the order of sale under O 31 r 2(2) is also set aside.

(3) The learned judge made no order as to costs having regard to the inequitable behaviour of the chargor in commencing the present proceedings at this late stage no doubt to avoid liability to pay money he had undoubtedly received.

(4) The learned judge was satisfied that s 66 of the Contracts Act does not apply because, although the charge as a security was void within the meaning of s 2(g) of the Act, as having been executed in breach of the restriction in interest imposed under s 120 of the Code, the contract of loan relating thereto was perfectly valid and enforceable. The chargee is, therefore, free to commence proceedings to recover the money lent or advanced to the chargor and interest thereon at the contractual rate.

[*Editorial Note*: After hearing further submissions from both parties, the learned judge decreed specific performance of the agreement to charge the land and ordered the chargor to execute a fresh charge in terms of the charge (with necessary modifications), within two weeks from the date of the order, failing which the senior assistant registrar be authorized to do so.]

Cases referred to

1 *Land Executive Committee of the Federal Territory* v *Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 (distd)
2 *Harkness* v *Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 (folld)
3 *Eu Finance Bhd* v *Lim Yoke Foo* [1982] 2 MLJ 37 (folld)
4 *Chin Choy & Ors* v *Collector of Stamp Duties* [1979] 1 MLJ 69 (refd)
5 *Walsh* v *Secretary of State for India* (1863) 10 HL Cas 367; 11 ER 1068 (refd)
6 *Hough* v *Windus*(1883-1884) 12 QBD 224 (refd)
7 *JE David* v *SPA De Silva* [1934] AC 106 (refd)
8 *O'Connor* v *Isaacs* [1956] 2 QB 288 (refd)
9 *Wong Fatt* v *Chong Ng* [1914] 1 FMSLR 142 (refd)
10 *Chin Tai* v *Siow Shiow & Ors* [1971] 1 MLJ 67 (refd)
11 *Wong Kim Swee* v *Tham Hock Cham* [1981] 2 MLJ 207 (refd)
12 *Jagabandhu* v *Radha Krishna* ILR 36 Cal 920 (folld)
13 *University of Delhi* v *Ashok Kumar Chopra* AIR 1968 Delhi 131 (folld)
14 *Surajmull* v *Triton Insurance Co Ltd* AIR 1925 PC 83 (folld)
15 *Menaka* v *Lum Kum Chum* [1977] 1 MLJ 91 (folld)
16 *Alghussein Establishment* v *Eton College* [1988] 1 WLR 587 (distd)

Legislation referred to

Companies Act 1965 s 108(1)
Companies Regulations 1966 Forms 33, 34
Contracts Act 1950 (Revised-1974) ss 2(g), 66
Courts of Judicature Act 1964 para 4 of Schedule
National Land Code 1965 ss 120, 124(1)(b), 241(3), 256, 301(c), 340(2)(b), (c), 418
Rules of the High Court 1980 O 31 r 2(2), O 83, O 92 r 4

NG Sivanandan (*Dominic Lai Yew Hock* with him) for the plaintiff.

K Balasundram for the defendant.

Cur Adv Vult

Edgar Joseph Jr J: In this case, the chargor having defaulted with payment, the chargee commenced proceedings to enforce the charge executed on 11 February 1983, bearing Presentation No 15364/83, Vol 2, 83, Folio 156 ('the charge'), by way of a charge action under O 83 of the Rules of the High Court 1980, praying for, inter alia, an order for sale of certain land, comprised in QT No HS (D) 19, Lot No 40(2), section 14, Bandar Georgetown, NED, Penang ('the land'), being the subject matter thereof, pursuant to the provisions of s 256 of the National Land Code 1965 ('the Code').

The chargor having failed to enter an appearance and, being absent although duly served, an order for sale was made on 9 July 1987. No appeal was lodged against that order so that when the chargor applied by way of originating summons to set it aside, the chargee contended, by way of preliminary objection, that the application was incompetent since the chargor's remedy was by way of appeal to the Supreme Court. I dismissed the preliminary objection for reasons which appear in my judgment reported in [1988] 1 MLJ 546.

I must now consider the chargor's application to set aside the order for sale on its merits.

All references to sections in this judgment are, unless otherwise stated, to the Code.

The ground upon which the chargor relies in support of his claim for a declaration is that the charge is void in that it was created on 11 February 1983 and registered on 16 December 1983, in breach of an express restriction in interest endorsed on the issue document of title to the land under s 120 of the Code, prohibiting, inter alia, the charging thereof without the written sanction of the state authority.

It was common ground that although an application for rescission of the restriction aforesaid under s 124(1)(b) of the Code had been made by M/s Wong-Chooi & Mohd Nor, the solicitors for Sabah Penang Development Sdn Bhd, the then registered proprietor, to the state authority as early as 9 January 1980 and followed up by their letter dated 9 February 1988, on behalf of the chargor, the same was not approved until 11 April 1988, that is to say, long after the registration of the charge.

It was submitted on behalf of the chargor that the chargee's title or interest in the land was thus defeasible because registration thereof was obtained by means of an insufficient or void instrument – s 340(2)(b) – and/or such title or interest was unlawfully acquired in consequence of the Registrar of Titles having registered the charge in breach of the restriction aforesaid and so had acted ultra vires the powers conferred upon him – ss 241(3), 301(c) and 340(2)(c).

For convenience, I reproduce hereunder the statutory provisions aforesaid; they are as follows:

> 120(1) Subject to the provisions of this section, the state authority may alienate land under this Act subject to such express conditions and restrictions in interest conformable to law as it may think fit.
>
> (2) The conditions and restrictions in interest to be imposed under the section in the case of any land shall be determined by the state authority at the time when the land is approved for alienation.
>
> (3) Every condition or restriction in interest imposed under this section shall be endorsed on or referred to in the document of title to the land; and in complying with this subsection the state authority shall, in any case where it imposes both conditions and restrictions in interest, distinguish between the two.
>
> 124(1)(b) The rescission of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the removal from that document of the expression 'padi', or any other expression by virtue of which the land is subject for the time being to the implied conditions specified in section 119;
>
> 241(3) The said powers shall be exercisable in any particular case subject to
> (a) any prohibition or limitation imposed by this Act or any other written law for the time being in force;
> (b) any restriction in interest to which the land in question is for the time being subject; and
> (c) in relation to leases, the provisions thereof, express or implied.
>
> 301(c) that the dealing which it effects is not contrary to any prohibition or limitation imposed by this Act or any other written law for the time being in force, or to any restriction in interest to which the land in question is for the time being subject;
>
> 340(2)(c) Where registration was obtained by forgery, or by means of an insufficient or void instrument;

Before me, counsel for the chargee took what may be regarded as another preliminary objection. It was said that the charge having been registered, the chargor's remedy if he was dissatisfied with the decision of the Registrar of Titles, was to appeal to the court pursuant to the provisions of s 418 of the Code which provides:

> (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.
>
> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the court shall make such order thereon as it considers just.
>
> (3) In this section 'decision' includes any act, omission, refusal, direction or order.

Counsel therefore contended that the chargor not having availed himself of the remedy of appeal, it was not now open to him to impugn the order for sale by the present proceedings. In support of this submission the following passage in the judgment of Raja Azlan Shah, Acting Lord President (as he then was) in *Land Executive Committee of the Federal Territory* v *Syarikat Harper Gilfillan Bhd*[1] was cited:

> For the purpose of this appeal it is only necessary to decide on the availability of declaration in lieu of the statutory right of appeal enacted by s 418 of the National Land Code. We are satisfied that there was a decision from which an aggrieved party may appeal to the High Court under the section. The section reads:
>
> '418(1) Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.'
>
> It is said by the appellants that the Code being a creature of statute and providing for special procedure relating to appeals on matters pertaining to it, declaratory relief is not available to the appellants ...

And, at p 237, his Lordship added this:

> Reading s 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time-limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given.

> The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it.
>
> For these reasons we are of the view that the court has no jurisdiction to entertain the claim sought by the declaration and the appeal must be allowed with costs here and below.

But, in *Harkness* v *Bell's Asbestos & Engineering Ltd*,[2] Lord Diplock stated the general rule at p 736 thus:

> It has long been laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.

This general rule was referred to with approval by Abdoolcader J (as he then was) when speaking for the Federal Court in *Eu Finance Bhd* v *Lim Yoke Foo*[3] and he added that:

> Where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings, before any court or tribunal and whenever it is relied upon – in other words it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

And, in the next paragraph, he dealt with the effect of failure to take advantage of the remedy of appeal where the impugned order is a nullity in these words:

> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void': see *Birmingham Churchwardens & Overseers* v *Shaw* [1849] 10 QB 868 at p 880 per Denman CJ.

The decision of Raja Azlan Shah in the *Harper Gilfillan case*[1] may be readily distinguished from the *Eu Finance case*[3] because in the former, unlike the latter, the impugned decision was not a nullity but made within jurisdiction: see the *Eu Finance* case[3] at p 40, col 1D-F.

The submission that it is not open to the chargor to impugn the order for sale by the present proceedings therefore fails.

The next point which calls for consideration is: what is the effect of registration of the charge in breach of the restriction in interest imposed pursuant to the provisions of s 124(1)(b) of the Code?

In considering this question, I have kept in the forefront of my mind, on the one hand, the well-known canon of construction enunciated by the Federal Court in *Chin Choy & Ors* v *Collector of Stamp Duties*:[4]

> ... that the meaning and intentions of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just and expedient ... However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.

and, on the other hand, the rule that statutes which encroach on the rights of a subject, whether as regards person or property are subject to a strict construction in the same way as penal statutes. It is also a settled rule that such statutes should be construed, if possible, so as to respect such rights (*Walsh* v *Secretary of State for India*,[5] per Lord Westbury; *Hough* v *Windus*,[6] per Bowen LJ) and, if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted (*JE David* v *SPA De Silva*[7] and *O'Connor* v *Isaacs*[8]).

I now turn to consider certain authorities (not cited to the court), which appear to be of direct relevance to the question for decision.

In *Wong Fatt* v *Chong Ng*,[9] the plaintiff who had become the holder of a registered sublease of mining land sought to eject the defendant. The primary defence raised was that the registration of the sublease had been obtained without compliance with certain statutory procedural requirements and that therefore the plaintiff had no title to sue for ejectment. The Court of Appeal upheld this defence. In his judgment, Braddell CJ said, inter alia, at p 145:

> From these facts, it is clear that the provisions of s 81 of the Registration of Titles Regulations were contravened and that in as much as neither the original lease nor a provisional certificate lawfully issued in lieu thereof was before the registrar when the registration of this sublease was applied for he had no authority under the Mining Code to register it and his act in making the endorsement on the office copy in these circumstances must be considered as ineffective to constitute valid registration.

And at p 146 he said, inter alia, this:

> If what had been done by the registrar had amounted only to a neglect to observe some formality it might be that the court could see its way to cure the irregularity, but here this cannot be said to be the case for the presence of one or other of these documents is made, as I understand the Regulations and the Code, essential to the right to register a sublease derived from such documents of title.

And, in the next paragraph, further down, he said this:

> Whether the sublease requires to be registered or not must in my opinion be answered with regard to the document itself and not to the title upon which it is founded and as the period for which the sublease was granted exceeded or might exceed, if the renewal of the lease were obtained, a term of one year it seems to me that it is subject to the provisions of s 28 and therefore it is not capable of being made otherwise than in accordance with the provisions of the Code and as it has not been registered in accordance with the law it is null and void to pass a legal title to the term which it purports to grant.

In *Chin Tai* v *Siow Shiow & Ors*,[10] a Federal Court decision, the transfer in favour of the purchaser was held by the court to be incapable of registration unless the permission of the Collector of Land Revenue was obtained since the title to the land contained a restriction requiring such consent.

In *Wong Kim Swee* v *Tham Hock Cham*,[11] a High Court decision, a restriction imposed on the title prohibited dealings with the land for ten years without the written approval of the Collector of Land Revenue. An agreement for a lease executed in breach of this condition was held to be incapable of registration as being in breach of the Code.

In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted ultra vires the powers conferred upon him: s 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute: *Jagabandhu* v *Radha Krishna*,[12] particularly when as here, the non-compliance goes to the root of the thing. In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi* v *Ashok Kumar Chopra*.[13]

Accordingly, no court is at liberty to enforce as valid, that which a statute has declared shall not be valid nor can compliance therewith be dispensed with even by consent of the parties or by failure to plead or argue the point at the outset: *Surajmull* v *Triton Insurance Co Ltd*.[14]

In the result, the chargor is entitled to the declaration prayed for; namely, that the order for sale aforesaid, in so far as it relates to the land be set aside, the registration of the charge having been procured in breach of the Code and I so order. In consequence, the order of the senior assistant registrar dated 17 December 1987 (encl 13) made pursuant to the summons to proceed with the order for sale under O 31 r 2(2) is also set aside.

However, for the avoidance of doubt, I would add that the rest of the provisions of the order for sale which relate to the property comprised in Lot Nos 457 and 458, held under grant first grade Nos 7130 and 7131, respectively, town section 14, NED, Penang, the subject of another charge bearing Presentation No 2047/83 Vol 261 Folio 91, which was not subject to any restriction in interest, shall remain in full force and effect.

It follows then that there will be a consequential order that the Registrar of Titles do cancel the memorials relating to the registration of the charge appearing both on the register and the issue document of title concerned. But I make no order as to costs having regard to the inequitable behaviour of the chargor in commencing the present proceedings, no doubt to avoid liability to pay money he had undoubtedly received, and that, too, at this very late stage.

I would add that I am not at liberty to put the chargor on terms that he pays the moneys due to the chargee under the terms of the charge as a condition for the grant of the declaration as was urged upon me by counsel for the chargee. As was well put by Lord Radcliffe in the Privy Council case of *Menaka* v *Lum Kum Chum*:[15]

> But their Lordships consider that amendment (of the order of the Federal Court) is also required because the avoidance of the contract and of the security is brought about by the provisions of the Moneylenders Ordinance and is not dependent or conditional upon payment of any sum of money by the respondent. Accordingly the declaration of avoidance in para (i) of the order should be in the opinion of their Lordships be unconditional. So should the orders in para (ii)(a)(b)(c) and (d) which are consequential on the declaration in para (i).

In the present case too, avoidance of the charge and its registration, are brought about by contravention of the provisions of the Code to which I have referred and is not dependent or conditional upon repayment by the chargor of the money lent to it. The case of *Alghussein Establishment* v *Eton College*[16] cited by counsel for the chargee is distinguishable since there no statutory provisions had been contravened.

I would further add that I have considered the question whether s 66 of the Contracts Act 1950 (Revised – 1974) ('the Act') might apply to the present case. That section provides as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

I am, however, satisfied that s 66 does not apply because, although the charge as a security was void within the meaning of s 2(g) of the Act, as having been executed in breach of the restriction in interest imposed under s 120 of the Code, the contract of loan relating thereto (unlike *Menaka's* case[15]) was perfectly valid and enforceable. The chargee is, therefore, free to commence proceedings to recover the money lent or advanced to the chargor and interest thereon at the contractual rate.

There is, however, one final point which needs to be made. The restriction in interest has, as I have already

noted, been rescinded by the Registrar pursuant to his powers under s 124(1)(b) so that there is now no impediment to the execution and registration of a fresh charge over the land concerned upon the terms which had been agreed by the parties. The charge, the subject of these proceedings, although declared by me to be void, is evidence of an antecedent agreement (either oral or written) to charge the land and such agreement is valid and enforceable.

The chargor has received the benefit of the money advanced on the security of the charge concerned which had been executed by both parties in good faith and in ignorance of the breach of the restriction in interest. In order, therefore, to satisfy the insistent demands for justice, I consider that I have the power under O 92 r 4 of the Rules of the High Court 1980 to grant an order for specific performance of the agreement to charge the land and require the chargor to execute a fresh charge in terms of the charge the subject of these proceedings but before I decide to exercise that power, I shall now hear counsel on both sides as to the propriety of my doing so.

[On 9 August 1988, the judge made the following further consequential orders and reasons therefore.]

Edgar Joseph Jr J: Having had the advantage of listening to the further submissions of counsel consequent to my invitation to hear them as to the propriety of my granting an order for specific performance of the agreement to charge the land and to execute a fresh charge in terms of the charge, I have a few words to add by way of supplementation to my judgment delivered yesterday.

The only objection raised by counsel for the chargor to an order for specific performance as aforesaid was that when the solicitors for the chargor M/s Wong-Chooi & Mohd Nor applied for the removal of the restriction in interest by their letter dated 9 February 1988 they were not authorized so to do; consequently, the rescission of the restriction in interest by the registrar was ineffective, regard being had to the provisions of s 124(1) of the Code which sstates that only the proprietor of alienated land may make such an application.

It is obvious from the affidavit evidence before me that in the matter of the preparation, execution and registration of the charge M/s Wong-Chooi & Mohd Nor were acting on behalf of both the parties thereto. The charge could not be registered unless and until the restriction in interest was rescinded and so the irresistible inference is that they were duly authorized if not expressly then certainly impliedly to make the application for rescission. In these circumstances, M/s Wong-Chooi & Mohd Nor's retainer may be said to amount to an 'entire contract'; that is to say, one to complete the work for which the retainer was given and therefore one that could not be terminated before completion (see *Cordery on Solicitors*, 7th Ed, p 79). Now, before a retainer can be terminated there must be 'something definite, clear and precise' (see 40 *Halsbury's Laws of England*, 4th Ed, pp 69-70). In the present case, there was no evidence of any termination of M/s Wong-Chooi & Mohd Nor's retainer aforesaid. Accordingly, I have no hesitation in dismissing the objection taken by counsel for the chargor.

I had said in my principal judgment that I considered that this court had authority to decree specific performance of the agreement to charge the land by virtue of O 92 r 4 of the Rules of the High Court 1980. I am fortified in this view by the Schedule to the Courts of Judicature Act 1964, which provides for the additional powers of the High Court and, in particular, para 4 thereof which reads:

> Power to order land to be charged or mortgaged, as the case may be, in any case in which there is jurisdiction to order a sale.

I do, therefore, now order that the chargor do execute a fresh charge in terms of the charge (but with such modifications as the circumstances may require especially as regards the present outstanding sum owing) within two weeks from date hereof, failing which, the senior assistant registrar of this court be authorized to do so. Similarly, the chargor shall do such acts or things as may be required of it under s 108(1) of the Companies Act 1965, within the like period aforesaid, failing which the senior assistant registrar to comply with the same. In the event of the senior assistant registrar having to comply with the requirements of s 108(1), then Forms 33-34 of the Companies Regulations 1966, shall be modified accordingly to meet the circumstances of this case and I do direct the Registrar of Companies to register the documents lodged with him for registration pursuant to these orders.

Upon presentation of the fresh charge duly stamped, executed as aforesaid and accompanied by the relevant issue document of title and registration fees, the Registrar of Titles shall register the same.

Lastly, there will be liberty to the chargee to forthwith lodge a caveat against the land in order to protect its position pending registration of the fresh charge.

Order accordingly.

Solicitors: *Presgrave & Matthews*; *Balasundram & Co.*

Reported by *Wong Kim Fatt*